86-967

No._____



IN THE

# Supreme Court of the United States

October Term, 1986

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation,

*Petitioner,*

vs.

DONALD E. BEISSEL,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## Question Presented for Review

In this tort action under the Federal Employers' Liability Act and the Safety Appliance Acts, 45 U.S.C. §§1-51, should this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review that Court's holding a railroad track motor car used by the Petitioner both on and off the track is subject to the regulations of Congress expressed in 45 U.S.C. §12:

> ("...It shall be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standards so prescribed by the Secretary.")

and that of the Secretary of Transportation:

> 49 C.F.R. §231.25 (c)
>
> ("Sill steps or footboards. Each track motorcar shall be equipped with safe and suitable sill steps or footboards conveniently located and securely fastened to car when bed or deck of track motor car is more than 24 inches above top of rail.")

when Petitioner does not cite any contrary authority, did not exhaust its remedies by requesting the Third Circuit for rehearing or rehearing *en banc*, did not demonstrate there is any significant number of track motor car Safety Appliance cases, and the ruling of this Court in the analogous case of *Baltimore & O. R. Co. v. Jackson*, 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957) settled the question contrary to the Petitioner's position?

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Supplemental Statement of the Case

Respondent's exemplary career of more than 30 years with Petitioner came to an abrupt end on December 6, 1982 (R. 72a, 74a) because of permanently and totally disabling injuries to his back on that date caused by the giving way under his foot of the sill step on Petitioner's track motor vehicle (R. 95a).

Paragraphs 1 and 2 of Petitioner's Answer (R. 8a) admitted Petitioner and Mr. Beissel were engaged in and affecting interstate commerce at all times material to the accident which is the subject of this lawsuit as alleged in paragraphs 1 and 2 of Respondent's Complaint (R. 6a). Those admissions were received in evidence (R. 62a).

Petitioner's Chief Engineer, Robert M. Butter (R. 290a), called in Petitioner's own case, testified:

"BY MR. HAMMER:

"Q. I'm looking at Exhibit 4 that's already in evidence. Do you recognize that as the high rail car, HR, what is it, 1001?

"A. Yes, sir.

"Q. And you have used that thing, have you not?

"A. Many times.

"Q. Right. And this is a car that men can either drive on the road or put on and take off the tracks, is it not?

"A. Yes, sir, that is correct." (R. 327a).

There was no contradictory evidence. The only estimates of the distance from the top of the rail to the bed or floor of the car ran from a low of 28 inches (R. 83a) to a high of 32 inches (R. 179a). The lowest estimate has the floor of the car 4 inches over the minimum height promulgated by the regulations.

Mr. Mayfield testified that the track motor vehicle involved in the accident had been used on the rails for at least two days in the week immediately preceding the accident (R. 115a, 116a). To quote:

"Q. Now, Mr. Mayfield, how long had the van been at Glassport, this particular van, before the day of the accident?

A. I think we had it there about a week.

Q. And was it used every day?

A. Not that I recall—no, not used every day.

Q. How frequently in a week's time would it be used?

A. For our purposes we may use it two or three days a week if it is at our disposal.

Q. You mean it is not always at your disposal?

A. No, sir, it is not.

Q. Okay. If you could estimate for us, the week that we are talking about now, the week right before the accident, could it have been two or three times that week?

A. This particular vehicle is equipped with a gauger, a thing called a gauger, which you hook on the back of the truck and you drag it along and it will tell you what the gauge is, that is, the distance between the rails, if it is out or correct. And I think we had gone on a gauging trip. That is rather lengthy. It would probably take you at least two days to do our whole territory.

Q. And so that means you would use it in the rail position; in other words, you would have put the van on the tracks then you would have towed this gauging machine behind it?

A. That is correct.

Q. And that would have probably taken two days?

A. Probably."

On December 6, 1982, Mr. Beissel and his assistant, Warren Mayfield (R. 72a, 74a) were assigned the job of taking the motor truck vehicle from Glassport, Pennsylvania to McKees Rocks, Pennsylvania (R. 75a). This was a 1969 Dodge passenger van fitted with extra wheels that permit it to be run on railroad tracks or on the road (R. 75a). At that time, the car was 13 years old and had been stored outside for as long as Mr. Lash had worked at the P&LE (R. 148a, 149a). As of October 1985, Mr. Lash had worked for about 14 years for the P&LE (R. 126a). The required auxiliary step had been installed below the passenger door of the car as part of the

process of adding the railroad equipment after the van was purchased (R. 131a). The step is supposed to be attached to the van by two inner braces that run up and in from the step and are bolted under the van and by two other braces that run up and are bolted through the body of the vehicle from the outside (R. 133a). Mr. Lash testified he was P&LE's equipment engineer (R. 126a) who was responsible for track maintenance equipment which included the railroad equipment on the Dodge (R. 127a). After the accident, Mr. Beissel showed the van to him at McKees Rocks and reported that two bolts were missing from the step and it was not totally secured (R. 130a). Mr. Lash then looked at the step and noticed the two bolts were missing that should have attached the tops of the outer support braces of the step to the body of the van (R. 132a, 133a). Mr. Lash testified:

> "Q. All you know is those bolts should have been there and were gone?
> A. "Yes"." (R. 148a).

Pursuant to instructions, Mr. Beissel and Mr. Mayfield set off in the high rail car on the road from Glassport to McKees Rocks, Pennsylvania with Mr. Mayfield driving (R. 84a). About two miles from the Glassport Office, they stopped for coffee at a convenience store (R. 84a, 85a). Mr. Mayfield did not see the accident because he had gotten back into the truck and was putting a hole in the styrofoam lid of the cup, but he felt Mr. Beissel getting into the truck and then heard him yell (R. 87a). When Mr. Mayfield looked, he saw Mr. Beissel standing holding onto the van (R. 87a), bent over in some anguish (R. 88a). Mr. Beissel told Mr. Mayfield at the scene the step had given way while he was getting into the car and he fell, hitting his back on the wheelwell (R. 88a, 89a). Mr. Mayfield helped him into the van and then kicked

the step (R. 89a). The step moved (R. 90a) and the front edge was bent down about 10 degrees (*id.*). The step was loose and hanging (R. 92a).

After the injury, they continued on to McKees Rocks with Mr. Beissel in anguish and distress (R. 93a). Mr. Mayfield and Mr. Beissel returned to Glassport separately (R. 96a, 97a) and later that same morning Mr. Mayfield helped put Mr. Beissel in an ambulance back at Glassport (R. 97a, 100a). Mr. Beissel has never worked for the P&LE since (R. 100a).

The Learned Trial Court, the Honorable Edward Dumbauld, of the United States District Court for the Western District of Pennsylvania, ruled there was no evidence that Respondent was negligent (R. 377a) and decided the provisions of the Safety Appliance Act did not apply (R. 379a) because of the mere fact that the sill step gave way while the vehicle was on the highway (R. 469a) a distance of only two miles from the tracks.

A unanimous panel of the Court of Appeals reversed the Trial Court's refusal to submit the Safety Appliance Act claim to the jury on September 15, 1986, following which the Petitioner requested neither a rehearing nor a rehearing *en banc*.

**Summary of Respondent's Argument Opposing Petition for Writ of Certiorari**

There is no valid reason for this Court to issue a Writ of Certiorari in this case. This case does not meet any Rule 17[1] criteria for the granting of certiorari. No conflict between different Courts of Appeal is involved, the Federal decision involved is not alleged to conflict with the ruling of any State Court of last resort, there is no averment that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; there is no decision by a State Court of last resort; the rarity of cases involving the application of the Safety Appliance Acts to track motor cars demonstrates there is no issue of broad general public interest involved, the Petitioner has cited no conflicting decision of this Court, and the question of the applicability of the Safety Appliance Acts to track motor vehicles was resolved contrary to Petitioner's position in the analogous case of *Baltimore & O. R. Co. v. Jackson*, 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957).

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[1] Rule 17 Supreme Court Rules.

## REASONS FOR DENYING A WRIT OF CERTIORARI

The Supreme Court of the United States thirty years ago decided the provisions of the Safety Appliance Acts applied to track motor cars. *Baltimore & O. R. Co. v. Jackson,* 353 U.S. 325, 77 S.Ct. 843, 1 L.Ed.2d 862 (1957). That case involved injuries caused by defective brakes on a gasoline powered track car which was pulling a hand car. The sole question before the Court was; Did the strict liability provisions of the Safety Appliance Acts apply? Both the Trial Court and Court of Appeals held for the Plaintiff. This Court affirmed. Petitioner's only claim of contrary authority is the dissent in Jackson.[2] Significantly, Petitioner adduces no other authority in support of its Petition. The Opinion of the Court of Appeals in this case[3] notes that secure sill steps have been required on track motor cars by regulation since 1966. 801 F.2d 146. A review of the annotations to the Safety Appliance Acts indicates that in the 21 years since there have been fewer than a half dozen reported decisions involving the application of those acts to track motor cars. The application of the Safety Appliance Acts to these very specialized cars was the subject of approximately four pages of Judge Mansmann's printed Opinion. She wrote at 801 F.2d 148:

> "The Defendant's van was being used in the regular course of business on both rail and highway. The Defendant had equipped the vehicle for rail and provided the required sill steps. So long as it continued to use the multi-purpose vehicle in this dual capacity, it was required by Section 11 of the Safety Appliance Acts to maintain a secure step."

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[2] Petition for Writ of Certiorari, page 10, footnote 7.

[3] Beissel v. Pittsburgh & Lake Erie R. Co., 801 F.2d 143 (3d Cir. 1986).

Judge Hunter noted in his brief concurring Opinion that the Act applied to the car "... because it was used both on and off the tracks." 801 F.2d 151. Judge Mansmann also observed that the Defendant did not contend there was insufficient evidence that the step was loose. 801 F.2d 145. The Petitioner's attempt to expand the importance of the narrow decision in this case by arguing that the dictum of the decision might apply to all of its motor vehicles is not true to the record. The Court of Appeals fully appreciated, as its Opinion demonstrated, that the case involved a highly specialized dual-purpose vehicle that served as both a railroad car and as a highway vehicle. That understanding is emphasized by Judge Hunter's concurrence and that is the holding of the case. Petitioner's attempted expansion of the holding to include a review of the dictum is an invitation to violate the actual case and controversy requirement of Article III, Section 2, of the Constitution of the United States.[4]

This subject was discussed in a pertinent Law Review Article, T. J. Lewis, Jr., *Federal Employers' Liability Act*, 14 South Carolina Law Quarterly 447 (1962). He wrote:

> "Also, it matters not when or *where* the defect occurs, if the appliance fails, there is liability on the part of the railroad which cannot be escaped." 14 S.C.L.Q. at 453." (Emphasis supplied).

Petitioner's position is contrary to the similar holding of the United States Supreme Court in the landmark case of *Coray v. Southern Pacific Co.*[5] *Coray* involved a collision caused by defective brakes; another safety appliance. In reviewing the Lower Court's direction of a

[4] United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943).

[5] 335 U.S. 520, 93 L.Ed. 208 (1949).

verdict for the railroad in the Safety Appliance claim, Mr. Justice Black wrote for the unanimous Court:

> "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment '*not from the position the employee may be in* or the work which he may be doing at the moment when he is injured'." 93 L.Ed. 210. (Emphasis supplied). (Citations omitted).

Mr. Justice Black also wrote:

> "And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." (*id.*).

It does not matter "where the defect—occurs". Lewis, 14 S.C.L.Q., 454. The 1966 change of the language of the Statute from "used or hauled on its line" to "used in interstate or foreign commerce", 45 U.S.C.A. §12, which is admitted by Petitioner, requires that Petitioner's reasoning be rejected. Mr. Beissel was a railroad employee engaged in interstate commerce when he was injured by the P&LE's defective step. His need for protection is just as great when the car is on the road as when it is on the tracks. The P&LE made no effort to remove the step for highway operation as it could have.

Also, to treat employees differently because of insignificant changes in time or location violates the uniformity in Federal tort law required by the Supreme Court. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970).

Petitioner's parade-of-horribles argument that the Opinion of the Circuit Court will cause confusion about complying with the Safety Appliance Acts and regulations rings hollow in view of the fact that its motor track car which injured Mr. Beissel had been equipped with the required sill step as the Statute and regulations require. Should the Secretary promulgate safety appliance regulations for vehicles that are not used on the track, as was this car, the railroad industry has many remedies including a request to Congress for legislation under the Commerce Clause of Article I, Section 8, of the Constitution of the United States.

If this Court were to review the non-dispositive dictum of this case and all other cases, it would be so overwhelmed by the flood of Appellate litigation that it would be unable to function. The finite resources of this Honorable Court should be conserved for a more meritorious petition by denying Petitioner's request for a Writ of Certiorari in this case.

## Conclusion

The single ruling of the Third Circuit Court of Appeals which Petitioner attacks, *i.e.*, the application of the Safety Appliance Act to the defective sill step of this track motor vehicle under the circumstances of this case, does not merit review by the Supreme Court of the United States. That issue in this case is clearly outside the scope of this Court's Rule 17 which specifies the legal questions that merit the granting of Writs of Certiorari to Circuit Courts.

The scholarly opinion of the erudite members of the Panel of the Third Circuit in this case evidences that a careful, competent and thorough study was made of all authority cited by the Petitioner and other pertinent information. The Panel of the Third Circuit, in deciding this case, made two rulings that favored Petitioner: (1) The refusal to apply the Doctrine of *Res Ipsa Loquitur* to the circumstances of this case, and (2) the approval of the Trial Court's departure from the Pretrial Rules.

Respondent respectfully moves this Honorable Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

JOSEPH MANION LUDWIG
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* *Counsel of Record*

**Request for Entry of Appearance**

SUPREME COURT OF THE UNITED STATES

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*Respondent.*

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The Clerk will enter my appearance as Counsel of Record for Donald E. Beissel, Respondent.

I certify that I am a member of the Bar of the Supreme Court of the United States.

By: JOSEPH MANION LUDWIG
JOSEPH MANION LUDWIG
518 Frick Building
Pittsburgh, Pennsylvania 15219
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**Certificate of Service**

I hereby certify that this 9th day of January, 1987, three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Richard C. Klaber, Esquire, Dickie, McCamey & Chilcote, P.C., Two PPG Place, Suite 400, Pittsburgh, Pennsylvania 15222, counsel for Petitioner.

I further certify that all parties required to be served have been served.

By: JOSEPH MANION LUDWIG
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# APPENDIX A

## Safety Appliance Acts, 45 U.S.C. §12

Act of March 2, 1893, ch. 196,
27 Stat. 531 (1893)
(codified at 45 U.S.C. §§1-5, 7 (1892))

*§12. Safety appliances, as designated by the Secretary of Transportation to be standards of equipment; modification of standard height of drawbars*

The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Secretary of Transportation shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 11 to 16 of this title, unless changed by an order of said Secretary of Transportation to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Secretary of Transportation shall be subject to a like penalty as failure to comply with any requirement of sections 11 to 16 of this title. Said Secretary is given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Secretary.

Apr. 14, 1910, c. 160, §3, 36 Stat. 298.

## APPENDIX B

### 49 Code of Federal Regulation §231.25(c)

Federal Railroad Administration, DOT

*§231.25 Track motorcars (self-propelled 4-wheel cars which can be removed from the rails by men).*

* * *

(c) *Sill steps or footboards.* Each track motorcar shall be equipped with safe and suitable sill steps or footboards conveniently located and securely fastened to car when bed or deck of track motorcar is more than 24 inches above top of rail.